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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 447

HYMAN KATZ,
Defendant and Appellant,

vs.

THE UNITED STATES OF AMERICA,
Plaintiff and Appellee

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH JUDICIAL CIRCUIT

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INDEX

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PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH JUDICIAL CIRCUIT

To the Honorable Supreme Court of the United States:

Petitioner, Hyman Katz respectfully shows the Court as follows:

I.

STATEMENT OF MATTER INVOLVED

(1) An indictment (R. 6) was filed in the District Court for the Eastern District of Michigan, Southern Divi-

sion, April 3, 1946, charging that petitioner, Hyman Katz, and one Norman Albert King, who is a brother of Katz (R. 18, 23), "On or about the 22nd day of October, A. D. 1945—did unlawfully, wilfully, feloniously, and knowingly, buy, receive, and have in their possession, and did wilfully aid and assist in buying and receiving, and having in their possession 66 Firestone tires—knowing all of the aforesaid tires to have been stolen * * *."

The indictment was brought under Section 409 U. S. C. A. Title 18.

(2) The record shows that to this indictment Katz, accompanied by his counsel Alfred May, pleaded guilty April 3, 1946 (R. 8, 9), and defendant King was that day discharged on motion of the District Attorney (R. 8, 10). Katz had never previously read the indictment, nor had it been shown him (R. 28).

(3) The transcript indicates the proceedings in court at the time of pleading guilty, in so far as it refers to the plea itself, as follows (R. 9):

> "Appearances: Mr. Thomas P. Thornton, Assistant U. S. District Attorney, in behalf of the Government; Mr. Alfred May, in behalf of the defendant.
>
> Mr. Thornton: I have a plea in the Katz case. Let the record show that I am handing the defendant a copy of the indictment.
>
> The Court: All right. Give him the receipt.
>
> Mr. May: In this case, if the court please, this defendant, Katz, desires to enter a plea of guilty at this time.
>
> The Court: Have him sign that receipt for the indictment, Mr. Katz, did you hear what Mr. May said?
>
> The Defendant: Yes, sir.
>
> The Court: Did anybody make any promise to you to get you to plead guilty?
>
> The Defendant: No, sir.

The Court: Anybody make any threats to cause you to plead guilty?

The Defendant: No, sir.

The Court: You have talked with Mr. May about this case, have you?

The Defendant: Yes, sir.

The Court: You are pleading guilty because you know you are guilty, is that correct?

The Defendant: Yes, sir.

The Court: All right. The plea will be accepted and the matter referred to the Probation Department for investigation and report."

(4) Under date of April 17, 1946, the Probation Department filed a report in which they gave a resumé of the defendant's statement to them as follows (R. 58):

> The defendant related that his brother, who was a partner with him, made the negotiations with Giordano. The defendant believed that the transaction was legitimate and accepted his brother's representation that the tires were Grade 2 which did not require certificates of the O. P. A. The defendant declared that he was unaware that these tires were Grade 1 tires until they were delivered, and the defendant continues to deny having any knowledge of 60 tires, but admits having received only four which he caused to be mounted upon his own automobile.

The report also said (R. 61):

> "The defendant's statement that he was not aware that the tires were stolen does not seem plausible in view of the fact that he was engaged in the automobile business and should have been well aware that certificates from the O. P. A. were necessary in order to purchase new tires."

(5) Defendant, with the same counsel, appeared again on May 6, at which time counsel asked that the Court

consider probation for the defendant, but the Court indicated that the sentence would be a term of ten months, which was not however imposed at that time, but defendant was ordered to appear May 11 for sentence (R. 11).

(6) Katz next appeared in court, accompanied by another attorney, Mr. Charles S. Porritt, on May 13, 1946, when a request was made and granted for time in which to fully investigate, and bring on a motion to vacate the plea and have a trial (R. 12, 13). The time for hearing such motion was set by the Court for May 20, 1946 (R. 13).

(7) On May 15, 1946, a motion for leave to withdraw the plea of guilty was filed by Mr. Porritt's law firm (R. 14, 15). The motion came on for hearing as set by the Court on May 20, at which time Katz was sworn and testified at length, with examination by his counsel, the Court, and cross-examination by the District Attorney (R. 16-33).

(8) In this testimony it appeared that Katz had returned to Detroit from service in the Army on October 6, 1945 (R. 16). Previous to going into military service he had been engaged in the used car business with a younger brother, Irving Katz, the business being known as Kay Motor Sales (R. 18). Irving Katz was at this time still in Military Service (R. 18). When defendant Katz went into military service, the older brother, Norman King, came into the business to run it for both of the other brothers (R. 18). More accurately, defendant Katz "gave up" his interest in the business at that time, and Norman King operated under a power of attorney from Irving (R. 18).

When defendant Katz returned from the service he did not immediately devote his entire time to the business

until about the 30th of October (R. 19) though he spent some time there. On the day of the tire transaction, he was present in an adjoining room where his brother was talking with another man, not known to Katz, but whose name was Giardono, as Katz learned later (R. 27). Katz overheard a conversation about tires (R. 27). The brother asked Katz for $200 cash, which Katz gave him, of the firm's money (R. 29). Katz did not talk to Giordano at all (R. 17) but gave the $200 to King as requested. It was not until later that King told Katz what the money was for (R. 19) but he did so after the conversation with Giordano (R. 19) the same day (R. 20, 28). Katz never saw Giordano there afterward (R. 20) and never saw the tires (R. 17) until later (R. 20). Katz now knows that Giordano was manager of Victory Tire Company, with whom Kay Motor Sales had been doing business for 2½ years (R. 17) and had previously paid them for tires (R. 33). He was also informed, for the first time, by a member of F. B. I. that the tires were stolen, after he was arrested (R. 38).

The transaction involved about $900.00, and for the balance a check was given Giordano which had been taken in previously on the sale of a car. It was given, however, by King, not by Katz.

(9) With direct reference to the plea of guilty, Katz testified at this time under cross-examination (R. 23):

> "Q. Did Mr. May make any promises to you?
> A. No, he didn't make any promises.
> Q. So you followed his advice and entered a plea of guilty, is that correct?
> A. That is correct, but I didn't understand what the charge was, sir.
> Q. Well, his advice to you was to enter a plea of guilty, was it?
> A. At the time, yes.

Q. You did that?
A. I did that to get it—
Q. (Interrupting): Now, subsequent to that—that was April the 3rd, I believe, was it not?
A. I believe it was, sir."

Under examination by the court on the same occasion he testified (R. 32):

"Q. When you plead guilty in this court, what did you think you were pleading guilty to?
A. Knowledge of the fact that tires were bought but no knowledge of the fact that the tires that were bought were stolen tires or that there was anything wrong with them at any time.
Q. You didn't decide to change your mind about pleading guilty until I announced to you that your sentence would be ten months?
A. Well, sir, before then, sir. I felt as though I wasn't guilty and I wanted my counsel to change it."

Katz deposes in an affidavit prepared by himself and delivered to the court June 14, 1946 (R. 62), that he remonstrated with his attorney afterward in the hallway of the courtroom, on the day the plea was entered, and protested his innocence (R. 54).

It also appears in the testimony of May 20 that Katz had told the law enforcement officers that he, himself, bought the tires. This he did to shield his brother King, who was very ill of a heart ailment (R. 21 and see also R. 52-53).

(10) Nowhere, however, does Katz indicate that he knew the tires were stolen when they were purchased, or knew that guilty knowledged was an element of the offense charged against him.

(11) Mr. Porritt, Katz' counsel subsequently asked to withdraw his motion (R. 5, 48) though there is no order

of withdrawal in the record. On July 19, 1946, there was a second substitution of attorneys, and the law firm of Mr. Joseph W. Louisell entered its appearance (R. 34, 35). This firm of attorneys filed a second motion to vacate the plea of guilty previous to filing an appearance on July 17, 1946 (R. 5, 35-39). The main grounds of this motion were as follows (R. 36):

> "2. That at the time this Court entered a plea of guilty for defendant, the defendant did not understand that an essential element of the offense with which he was charged was knowledge of the fact that the tires were stolen, but that defendant believed that any possession of tires subsequently discovered to have been stolen constituted the crime denounced by the statute. That since April 3, 1946, defendant has been advised by counsel that mere possession of tires without knowledge that the tires were stolen at the time of such possession does not constitute the offense described in the statute.
>
> "3. That in truth and in fact the defendant did not know that the tires involved were stolen at any time during the transaction complained of in the indictment, but that the tires referred to in said indictment were in truth and in fact delivered to the Kay Motor Sales in which defendant had an interest, by a person who warranted and represented that the tires were lawfully acquired by him and sold to the Kay Motor Sales for a valuable consideration.
>
> "4. That the defendant at no time committed, aided or abetted in the commission of the acts complained of in the indictment.
>
> "5. That the defendant did not at any time aid or assist in buying or receiving tires knowing them to have been stolen" (R. 36).

(12) Attached to this motion is the affidavit of Katz (R. 37-39) in which he deposes in part as follows (R. 39):

"6. That at no time did deponent offer a plea of guilty to the indictment, but that on the contrary deponent has persisted in his statement that he was not guilty of the crime alleged in the indictment. Further deponent says that at the time of the proceedings held on the 3rd day of April, 1946, he had not read the indictment returned by the Grand Jury nor had he consulted with counsel with respect to entering a plea of guilty to the said indictment, but that on the contrary deponent's then counsel, Alfred May, offered a plea of guilty on behalf of deponent without deponent having consented to or agreed to plead guilty. That had deponent known the true facts, and were he cognizant of his rights at the time, he would have emphatically denied his guilt at the said arraignment April 3, 1946."

This motion was argued at length on July 22, 1946 (R. 40-50). At the argument defendant's attorney offered in support thereof another affidavit of Katz heretofore referred to (R. 46, 47, 48, 49) which the defendant, himself, had drawn (Defendant's Ex. 1, R. 50-56). In this affidavit (R. 50-56), appellant deposes in part as follows (R. 53-54):

"I did not see or hear from Mr. May or the Court until one afternoon, Mr. Goldfarb, the bondsman, called me and informed me I was to be in Court at 10 o'clock the next morning, I asked him why my attorney did not call and notify me. He told me he thought my attorney was out of town. I called Mr. May's office immediately and I was told by his secretary that Mr. May had just come back from Florida and would call me as soon as he got back to his office, which he did.

"He notified me to be in Court at ten a. m. the following morning. I told him over the telephone that Norm was in California and he went there with his permission; what was he going to tell the Judge about Norm not being there with me. He said

'Don't worry about that, I will explain it to the Judge. This is only an arraignment, you know, and I will have it postponed until your brother gets back from California.'

"I arrived at the Federal Building at 9:30 A. M., and waited in the corridor of Judge Lederle's courtroom until ten o'clock. Mr. May had not arrived yet. I walked into the courtroom and sat down. The Judge came in; everyone stood up, and as the Judge sat down, Mr. May came into the court room, walked up to me (this happening to be the first time that I saw Mr. May since the day we first told him the complete story) and said: 'You will plead "guilty." I am having the indictment dismissed against your brother.' I started to ask him the reason for my pleading guilty when my name was called by the Court. I stepped before the Judge; Mr. May stepped up and spoke. He told the Judge that I was pleading guilty. The Judge then asked me whether anyone had promised me anything or threatened me, to make me enter my plea of guilty. Standing there, confused, I said 'No.' He then asked me whether I had read the indictment and my counsel spoke up and said 'yes, he did.'

"I had not read the indictment, nor did my counsel at any time discuss anything with me at all pertaining to the indictment. I was then asked to sign the indictment in Court, which I did.

"We left the court room, stopping in the hallway and Mr. May spoke with a man who I think is an Assistant Prosecutor and he told him that there were seventeen tires in our possession that we would return upon request. Later I questioned Mr. May as to why he had me plead guilty. He assured me that I would undoubtedly receive a suspended sentence or probation, at the worst. I told him that was not good enough; that I was not guilty of anything and I could see no reason, nor any benefits to be derived by me pleading guilty just to have the

indictment dismissed against my brother, who I definitely know is also innocent of the indictment, as I understand it."

Katz further deposes in the same affidavit (R. 55, 56):

"A few days later, I went to see a friend of mine, who is an attorney in Detroit. His name is Charles Porritt and I discussed my case with him. He went to the Federal Building, looked up the case, read the indictment, and in return, knowing the true story, told me he would enter a motion to withdraw my plea from 'guilty' to 'not guilty.' That motion was entered and came before Judge Lederle. I was put on the stand and asked some questions by the Prosecuting Attorney.

"Judge Lederle himself then told me while I was on the stand, that if Mr. May would appear before him in two days, being a Wednesday morning, and explain to the court that he had not explained my rights to me, that he might reopen the case.

"Mr. Porritt and Mr. May were both present that morning in the court, and Mr. May and Mr. Porritt called me into the hallway. Mr. May spoke, telling me that it would be best that I withdraw the motion because he had reasons to believe the Judge would deny it and that he had something else to work on. This statement was made before two people and myself in the corridor of the court.

"Not being an attorney myself, and not knowing what to do, only following the advice of my counsel, I consented and Mr. Porritt asked the court to withdraw the motion, at which time he asked the court to give me a 30 day extension to settle my affairs, which was granted.

"At this time I would appreciate the opportunity to prove my innocence in this matter."

(13) Upon the situation thus presented, the trial court on July 22, 1946, entered its order denying the motion to vacate the prior plea of guilty (R. 49, 63), imposed the sentence previously suggested May 6, 1946, and entered the formal sentence of record (R. 64).

(14) Notice of appeal was filed July 23, 1946 (R. 65), to the Circuit Court of Appeals of the Sixth Judicial District.

(15) Error was assigned in said court as follows (R. 3):

> "1. The court erred in denying appellant's application to vacate his plea of guilty previously entered.
>
> "2. The court erred in denying, by its order of July 22, 1946, the right of appellant to withdraw his plea of guilty before trial or sentence.
>
> "3. The court erred by abusing its discretion in denying appellant's motion to change his plea of guilty to not guilty by its order of July 22, 1946.
>
> "4. The court erred in making its order of July 22, 1946, denying appellant's application to vacate his plea of guilty, for the reason that appellant did not know the nature of the charge in the indictment.
>
> "5. The court erred in making its order of July 22, 1946, denying appellant's application to vacate his plea of guilty for the reason that appellant was not guilty of the charge in the indictment.
>
> "6. The court erred in making its order of July 22, 1946, denying appellant's application to vacate his plea of guilty, for the reason that said plea was entered because of a threat that the brother of appellant, Norman Albert King, would be prosecuted.
>
> "7. The court erred in making its order of July 22, 1946, denying appellant's application to vacate his plea of guilty, for the reason that it was contrary to justice."

(16) The matter duly came on for hearing in said court upon briefs filed and oral argument of counsel, and was by that court affirmed without opinion, save a recital in the order, on April 7, 1947.

(17) Thereafter a motion for a rehearing was duly filed, based on the following reasons:

> "(a) The Court failed to give the defendant the benefit of every reasonable presumption against the defendant's waiver of his fundamental rights.
>
> "(b) The Court did not give effect to the fact that there had never been a lawful arraignment under Rules 10 and 11 of the Rules of Criminal Procedure.
>
> "(c) The Court did not take into consideration the fact that the defendant had tried in every possible way to have his plea changed before the court indicated that sentence would be imposed, as evidenced by defendant's Exhibit '1,' and also the Government's Exhibits '1' and '2,' the Probation Reports.
>
> "(d) The Court did not take into consideration the fact that defendant had always indicated that at the time of pleading guilty he was under a material misapprehension as to the charge in the indictment, as evidenced by defendant's Exhibit '1,' by the testimony taken in the lower court on May 20, 1946, and by the Government's Exhibits '1' and '2,' the probation reports.
>
> "(e) The Court should have exercised its discretion so that the defendant would receive justice.
>
> "(f) The Court erred in holding that the lower court had not abused its discretion.
>
> "(g) The Court erred in not taking into consideration and giving proper effect to the showing made in defendant's testimony of May 20, 1946, in

his Exhibit '1,', and the Government's Exhibits '1' and '2,' the probation reports.

"(h) The Court erred in holding that the trier of the facts had properly determined the facts."

(18) The said Circuit Court of Appeals denied the application for a rehearing on October 21st, 1947, without opinion.

II.

STATEMENT OF JURISDICTION

(19) Petitioner claims that this court has jurisdiction to issue its writ of certiorari to the U. S. Circuit Court of Appeals for the Sixth Judicial Circuit, to review its affirmance on April 17, 1947, of the judgment below in the District Court for the Eastern District of Michigan, Southern Division, under the provisions of Section 240 of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. C. A. Title 28, Section 347 a) which is as follows:

> "In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

A timely application for rehearing was decided by said Circuit Court of Appeals on October 21, 1947, consequently this application is within the three month time

limited after the dismissal of the application for rehearing. *U. S. v. Seminole Nations,* 57 S. Ct. 283, 299 U. S. 417, 81 L. Ed. 316.

III.

STATEMENT OF QUESTIONS INVOLVED

(20) Petitioner asserts that under the two applications to change the plea of guilty to not guilty in the District Court (R. 14-15, 35-39), the assignments of error in the Circuit Court of Appeals (R. 3) and the motion for a rehearing in the same court, the following points are clearly raised:

(a) That at the time of pleading guilty to the indictment, defendant did not understand the charges therein made in a material aspect.

(b) That the court exceeded its discretion in upholding a waiver of defendant's fundamental right to a trial.

IV.

REASONS RELIED ON FOR ISSUANCE OF WRIT

(21) Petitioner believes that the following reasons exist for the issuance of the writ prayed:

(a) The lower court decided a federal question in a way probably in conflict with the applicable decisions of this court.

(b) The Circuit Court of Appeals has so far sanctioned a departure by the trial court from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of revision.

(c) The right to a trial of any person charged with an offense is involved.

(d) The lower court, being the Circuit Court of Appeals for the Sixth Judicial Circuit, has rendered a decision which in the opinion of counsel is in conflict with the decision of another Circuit Court of Appeals *(Berger v. U. S.,* 145 Fed. 2d 181, C. C. A. 8th Circuit 1944).

(e) The case presents the question, which would seem to be of general interest, as to whether on the arraignment on an indictment there must not be at least a substantial compliance with the rules of criminal procedure as laid down by this court, particularly Rules 10 and 11.

V.

PRAYER

Wherefore, petitioner prays that this Court let a writ of certiorari issue to the Circuit Court of Appeals for the Sixth Judicial Circuit to review its affirmance on April 7, 1947, of the order of the District Court denying petitioner's application to change his plea of guilty to not guilty.

Hyman Katz,
Petitioner.

EDWARD N. BARNARD,
Attorney for Petitioner,
906 Dime Building,
Detroit 26, Michigan.

State of Michigan,
County of Wayne—ss.

On this 19th day of November, A. D. 1947, before me, a Notary Public, in and for said County, personally appeared Hyman Katz, to me personally known, who being by me duly sworn, made oath that he has read the foregoing Petiiton for Writ of Certiorari by him subscribed, that he knows the contents and that the same is true of his own knowledge, except as to those matters therein stated to be upon information and belief and as to those matters he believes it to be true.

Agnes Secor,
Notary Public, Wayne County, Michigan.
My commission expires January 9, 1950.

Supreme Court of the United States

October Term, 1946

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

EDWARD N. BARNARD,
Attorney for Defendant and Appellant,
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Detroit 26, Michigan.

Lawyers Brief & Record Co., Case Bldg., 40 Fort St. W., Detroit 26, Mich.

STATEMENT OF QUESTIONS INVOLVED

1. Did defendant at the time of pleading guilty to the indictment understand the charges therein made in material aspects?

2. Did not the Court exceed its discretion in upholding waiver of defendant's fundamental right to a trial?

3. Are there not sufficient reasons to justify issuance of a writ of certiorari?

INDEX

INDEX TO AUTHORITIES

Decisions:

Rules of Court:

Statutes:

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

STATEMENT OF FACTS

An indictment was filed March 1, 1946, in the District Court for the Eastern District of Michigan, Southern Division, charging petitioner Hyman Katz and his brother, Norman Albert King, with the offense of knowingly buy-

ing stolen automobile tires on October 22, 1945, contrary to U. S. C. A. Title 18, Section 409, (R. 6, 18, 23).

Prior to this time, after the trouble arose, but before the filing of any indictment, Katz had conferred with Attorney Alfred A. May about the matter telling him the whole story. He did not hear from his attorney again however, until the day prior to arraignment on the indictment, when his bondsman notified Katz that the arraignment would take place the next day (R. 53). Mr. May had been absent from the city, and Katz did not see him until he was seated in the court room on the day set for arraignment, April 3, 1946 (R. 53), though Mr. May did return Katz' telephone call on April 2nd, and stated that he would have the arraignment adjourned (R. 53), due to the absence of King, the other defendant.

May arrived in the court room on April 3, 1946, immediately preceding the calling of the case for arraignment and stated to Katz, "You will plead guilty. I am having the indictment dismissed against your brother." Before Katz could remonstrate, the case was called (R. 53) and arraignment completed.

At this arraignment on April 3rd, the indictment was not read, nor was it explained by anybody (R. 9). The District Attorney announced, "I have the plea in the Katz case" (R. 9). No questions were asked of the defendant to determine whether or not he understood the charge (R. 9). He stated that he had talked with Mr. May about the case, and answered affirmatively to the court that he was "pleading guilty because you know you are guilty" (R. 9). The plea was accepted, and Katz referred to the Probation Department (R. 10). The transcript shows the proceedings as follows so far as they pertain to the plea (R. 9):

"Appearances: Mr. Thomas P. Thornton, Assistant U. S. District Attorney, in behalf of the Government; Mr. Alfred May, in behalf of the defendant.

Mr. Thornton: I have a plea in the Katz case. Let the record show that I am handing the defendant a copy of the indictment.

The Court: All right. Give him the receipt.

Mr. May: In this case, if the court please, this defendant, Katz, desires to enter a plea of guilty at this time.

The Court: Have him sign that receipt for the indictment, Mr. Katz, did you hear what Mr. May said?

The Defendant: Yes, sir.

The Court: Did anybody make any promise to you to get you to plead guilty?

The Defendant: No, sir.

The Court: Anybody make any threats to cause you to plead guilty?

The Defendant: No, sir.

The Court: You have talked with Mr. May about this case, have you?

The Defendant: Yes, sir.

The Court: You are pleading guilty because you know you are guilty, is that correct?

The Defendant: Yes, sir.

The Court: All right. The plea will be accepted and the matter referred to the Probation Department for investigation and report."

On motion of the District Attorney, the indictment was at this time dismissed as to King (R. 10).

Katz, in the corridor immediately after the arraignment, inquired of Mr. May "as to why he had me plead guilty" and was told by May that he "would undoubtedly receive a suspended sentence or probation, at the worst" (R. 54). Katz stated that this was not sufficient as he was "not guilty of anything" (R. 54). To days later by telephone he sought to have Mr. May change the plea again, and

was told to "forget it," but that he would do his best (R. 55).

Katz did not appear in court again until May 6, 1947 (R. 11), ostensibly for sentence. However, before this time he had stated to the Probation Department that he "believed the transaction was legitimate" (R. 58), and "that he was not aware that the tires were stolen" (R. 61) as shown by the probation report which the Court itself insisted be made a part of this record (R. 48, 49). On May 6th, however, the court announced that the sentence would be ten months, but on request of Mr. May, based on reasons there stated, the sentence was not imposed, but the defendant was told to "reappear here for sentence next Monday, the 11th" (R. 11).

It seems that there were no proceedings on the 11th, but on May 13th, Katz did appear with another attorney, who announced that he wished to file a motion to withdraw the plea of guilty, and May 20 was set by the court to hear the motion (R. 12-13).

The motion was filed on May 15 (R. 14-15), wherein Katz claimed among other things that at the time he pleaded guilty he "did not understand the nature of the charge in the indictment" and that he had not purchased tires "knowing them to be stolen," and since having the charge explained to him he was "convinced that he was not guilty" (R. 14).

At the hearing on this motion on May 20, Katz was sworn and examined and cross-examined at length (R. 20-34). It appears from his testimony that shortly prior to the date of the alleged offense he had returned from military service and did not immediately resume his full duties in the used car business in which he was interested, and which King was running during the absence of him-

self and the other owner who was a third brother still in military service (R. 16-17, 19). However, on the 22nd of October, Katz testified that he was present there, and overheard a conversation which King had in an adjoining room with another man, whose name Katz later learned was Gerdano about some tires. Katz did not talk to Gerdano at all, but King asked Katz for $200.00 which Katz gave him of the firm's money (R. 17, 29). Katz did not know what the transaction was about until later (R. 19) the same day (R. 20, 28). Katz never saw Gerdano there again (R. 20) and did not see the tires until later (R. 20). He found out later, however, that Gerdano was manager of a firm with whom they had been doing business for 2½ years (R. 17).

He was first informed that the tires were stolen when he was arrested (R. 28) later.

Katz testified on this occasion, May 20, that he entered the plea of guilty on May's advice "but I didn't understand what the charge was, sir" (R. 23). When questioned by the court, Katz also testified (R. 32):

> "Q. When you plead guilty in this court, what did you think you were pleading guilty to?
>
> A. Knowledge of the fact that tires were bought but no knowledge of the fact that the tires that were bought were stolen tires or that there was anything wrong with them at any time.
>
> Q. You didn't decide to change your mind about pleading guilty until I announced to you that your sentence would be ten months?
>
> A. Well, sir, before then, sir. I felt as though I wasn't guilty and I wanted my counsel to change it."

The Probation Report definitely shows that this was Katz' position before there was any intimation from the Court that a sentence would be imposed.

The motion to vacate was withdrawn (R. 5, 48) though no order appears of record. It was withdrawn on the advice of Mr. May, who was present in court the day the testimony was taken, May "telling me that it would be best that I withdraw the motion because he had reasons to believe the Judge would deny it and that he had something else to work on" (R. 56).

On June 14, Katz, himself, prepared an affidavit (Defendant's Exhibit 1, R. 50-56) and delivered same to the Court on that day (R. 62) and filed in the Probation Department, which was later offered in support of his application to withdraw his plea of guilty (R. 46, 47, 48, 49). In part he deposed therein as follows (R. 53-54):

> "I did not see or hear from Mr. May or the Court until one afternoon, Mr. Goldfarb, the bondsman, called me and informed me I was to be in Court at 10 o'clock the next morning, I asked him why my attorney did not call and notify me. He told me he thought my attorney was out of town. I called Mr. May's office immediately and I was told by his secretary that Mr. May had just come back from Florida and would call me as soon as he got back to his office, which he did.
>
> "He notified me to be in Court at ten a. m. the following morning. I told him over the telephone that Norm was in California and he went there with his permission; what was he going to tell the Judge about Norm not being there with me. He said 'Don't worry about that, I will explain it to the Judge. This is only an arraignment, you know, and I will have it postponed until your brother gets back from California.'
>
> "I arrived at the Federal Building at 9:30 A. M., and waited in the corridor of Judge Lederle's courtroom until ten o'clock. Mr. May had not arrived yet. I walked into the courtroom and sat down.

The Judge came in; everyone stood up, and as the Judge sat down, Mr. May came into the court room, walked up to me (this happening to be the first time that I saw Mr. May since the day we first told him the complete story) and said: 'You will plead "guilty." I am having the indictment dismissed against your brother.' I started to ask him the reason for my pleading guilty when my name was called by the Court. I stepped before the Judge; Mr. May stepped up and spoke. He told the Judge that I was pleading guilty. The Judge then asked me whether anyone had promised me anything or threatened me, to make me enter my plea of guilty. Standing there, confused, I said 'No.' He then asked me whether I had read the indictment and my counsel spoke up and said 'Yes, he did.'

"I had not read the indictment, nor did my counsel at any time discuss anything with me at all pertaining to the indictment. I was then asked to sign the indictment in Court, which I did.

"We left the court room, stopping in the hallway and Mr. May spoke with a man who I think is an Assistant Prosecutor and he told him that there were seventeen tires in our possession that we would return upon request. Later I questioned Mr. May as to why he had me plead guilty. He assured me that I would undoubtedly receive a suspended sentence or probation, at the worst. I told him that was not good enough; that I was not guilty of anything and I could see no reason, nor any benefits to be derived by me pleading guilty just to have the indictment dismissed against my brother, who I definitely know is also innocent of the indictment, as I understand it."

Katz further deposes in the same affidavit (R. 55, 56,):

"A few days later, I went to see a friend of mine, who is an attorney in Detroit. His name is Charles Porritt and I discussed my case with him. He went

to the Federal Building, looked up the case, read the indictment, and in return, knowing the true story, told me he would enter a motion to withdraw my plea from 'guilty' to 'not guilty.' That motion was entered and came before Judge Lederle. I was put on the stand and asked some questions by the Prosecuting Attorney.

"Judge Lederle himself then told me while I was on the stand, that if Mr. May would appear before him in two days, being a Wednesday morning, and explain to the court that he had not explained my rights to me, that he might reopen the case.

"Mr. Porritt and Mr. May were both present that morning in the court, and Mr. May and Mr. Porritt called me into the hallway. Mr. May spoke, telling me that it would be best that I withdraw the motion because he had reasons to believe the Judge would deny it and that he had something else to work on. This statement was made before two people and myself in the corridor of the court.

"Not being an attorney myself, and not knowing what to do, only following the advice of my counsel, I consented and Mr. Porritt asked the court to withdraw the motion, at which time he asked the court to give me a 30 day extension to settle my affairs, which was granted.

"At this time I would appreciate the opportunity to prove my innocence in this matter."

On July 17 (R. 5), a second motion to withdraw the plea of guilty was filed by a third attorney (R. 35-39), accompanied by an affidavit. This motion was based upon substantially the same grounds, namely, that at the time the plea was entered Katz did not understand the charge, in that he did not understand that there must be guilty knowledge that the tires were stolen, and supposed that the bare fact that the tires were stolen was sufficient; but

after having the matters explained to him he was convinced that he was innocent (R. 36).

This motion was argued July 22, 1946 (R. 40-50). The court indicated throughout the argument that it was in his opinion a question of the dishonesty or incompetence of Katz' prior attorneys, denied the motion and imposed a sentence of ten months imprisonment (R. 49, 62).

Notice of appeal to the Circuit Court of Appeals, Sixth Circuit, was filed July 23, 1946 (R. 65). The assignments of error in that court were as follows (R. 3):

"1. The court erred in denying appellant's application to vacate his plea of guilty previously entered.

2. The court erred in denying, by its order of July 22, 1946, the right of appellant to withdraw his plea of guilty before trial or sentence.

3. The court erred by abusing its discretion in denying appellant's motion to change his plea of guilty to not guilty by its order of July 22, 1946.

4. The court erred in making its order of July 22, 1946, denying appellant's application to vacate his plea of guilty, for the reason that appellant did not know the nature of the charge in the indictment.

5. The court erred in making its order of July 22, 1946, denying appellant's application to vacate his plea of guilty for the reason that appellant was not guilty of the charge in the indictment.

6. The court erred in making the order of July 22, 1946, denying appellant's application to vacate his plea of guilty, for the reason that said plea was entered because of a threat that the brother of appellant, Norman Albert King, would be prosecuted.

7. The court erred in making its order of July 22, 1946, denying appellant's application to vacate his plea of guilty, for the reason that it was contrary to justice" (R. 3).

The Circuit Court of Appeals, after briefs were filed and arguments had, affirmed the sentence April 17, 1947, without opinion, except a recital in the order of denial.

A motion for a rehearing was timely filed in that court based upon the following grounds:

"(a) The Court failed to give the defendant the benefit of every reasonable presumption against the defendant's waiver of his fundamental rights.

(b) The Court did not give effect to the fact that there had never been a lawful arraignment under Rules 10 and 11 of the Rules of Criminal Procedure.

(c) The Court did not take into consideration the fact that the defendant had tried in every possible way to have his plea changed before the court indicated that sentence would be imposed, as evidenced by defendant's Exhibit '1,' and also the Government's Exhibits '1' and '2,' the Probation Reports.

(d) The Court did not take into consideration the fact that defendant had always indicated that at the time of pleading guilty he was under a material misapprehension as to the charge in the indictment, as evidenced by defendant's Exhibit '1,' by the testimony taken in the lower court on May 20, 1946, and by the Government's Exhibits '1' and '2,' the probation reports.

(e) The Court should have exercised its discretion so that the defendant would receive justice.

(f) The Court erred in holding that the lower court had not abused its discretion.

(g) The Court erred in not taking into consideration and giving proper effect to the showing made in defendant's testimony of May 20, 1946, in his Exhibit '1,' and the Government's Exhibits '1' and '2,' the probation reports.

(h) The Court erred in holding that the trier of the facts had properly determined the facts."

This motion was denied October 21, 1947, also without opinion.

Katz now seeks Certiorari from this court to review the determination of the Circuit Court of Appeals.

II.

STATEMENT OF JURISDICTION

Petitioner claims that this court has jurisdiction to issue its Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Judicial Circuit, to review its affirmance on April 17, 1947, of the judgment below in the District Court for the Eastern District of Michigan, Southern Division, under the provisions of Section 240 of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. C. A. Title 28, Section 347, (a)) which is as follows:

> "In any case, civil or criminal, in a Circuit Court of Appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted Writ of Error or appeal."

A timely application for rehearing was denied by said Circuit Court of Appeals on October 21, 1947, and this petition was docketed in this Court November 20, 1947, and is consequently filed within the time limited by Rule 37(a)(2) of the Federal Rules of Criminal Procedure. In the petition we erroneously relied on a three month rule, but the petition was filed within the 30-day limit.

III.

SUMMARY OF ARGUMENT

A. At the time of pleading guilty to the indictment, defendant did not understand the charges therein made in a material aspect.

(1) The arraignment itself did not enlighten defendant, for the indictment itself was not read or explained, a copy was not given defendant before pleading, and neither the court, nor anyone else, did anything to ascertain that defendant comprehended the charge. As a consequence, defendant did not understand that guilty knowledge is an element of the offense, and pleaded guilty under the misapprehension that if the tires were stolen before they were purchased, he was guilty. The procedure was contrary to the general and accepted practices laid down in rules 10 and 11.

(2) The usual presumption of regularity following from being represented by counsel does not apply, because the record clearly shows that defendant had no advice of counsel pertaining to the indictment or plea, counsel having been absent and defendant not having seen him since before the indictment was filed until the moment of pleading.

(3) Nor was defendant gambling with a plea of guilty, for prior to any intimation of sentence he stated his lack

of guilty knowledge to the Probation Department, besides which his affidavits and sworn testimony so establish.

(4) Counsel's statement to the court that he had talked with defendant is misleading and is unsubstantiated and contradicted by the record, and was not stated until long after the plea.

(5) The decisions, both federal and state, sustain the proposition that defendant should have been allowed to withdraw his plea of guilty.

B. The Lower Court exceeded its discretion in upholding a waiver of defendant's fundamental right to trial.

(1) The term "discretion" is one of varying meanings, and "abuse of discretion" does not mean bad motive, wrong purpose, perversity, passion, prejudice or partiality. It means failure to decide in accordance with the logic of the facts presented, or in accordance with reasonable and necessary deductions to be drawn therefrom.

(2) Particularly is this true when the matter involved is a waiver of fundamental rights, such as the right to a trial, as the decisions show. Failure to so decide on the uncontradicted facts presented was beyond the discretion of the Court.

IV.

ARGUMENT

A. AT THE TIME OF PLEADING GUILTY TO THE INDICTMENT, DEFENDANT DID NOT UNDERSTAND THE CHARGES THEREIN MADE IN A MATERIAL ASPECT.

(1) The arraignment, itself, on May 3, 1946, was utterly defective in the essential feature that no effort was made to determine whether or not the defendant understood the charge to which he was pleading guilty.

The Federal Rules of Criminal Procedure, under Rule 59 thereof, were effective March 21, 1946. *U. S. v. Claus,* D. C. N. Y. 1946, 5 F. R. D. 278; *Singleton v. Botkin,* D. C. D. C. 1946, 5 F. R. D. 173. By the terms of that rule, "They govern all criminal proceedings thereafter commenced and so far as practicable all proceedings then pending."

These rules therefore were applicable to the arraignment of defendant on April 3, 1946. It has never been doubted that they were so applicable.

Rules 10 and 11 specifically apply, being as follows:

> "RULE 10, ARRAIGNMENT:
>
> "Arraignment shall be conducted in open court and shall consist of reading the indictment or information to the defendant or stating to him the substance of the charge and calling on him to plead thereto. He shall be given a copy of the indictment or information before he is called upon to plead."
>
> "*RULE 11, PLEAS:*
>
> "A defendant may plead not guilty, guilty or with the consent of the court, *nolo contendere.* The court may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the

> plea is made voluntarily with the understanding of the nature of the charge. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appeal, the court shall enter a plea of not guilty."

It is perfectly evident that in the very short proceeding on May 3rd, 1946, as disclosed by the transcript, when the defendant King was dismissed on motion of the District Attorney with no reason stated, and this petitioner pleaded guilty to the indictment, that the foregoing rules were not complied with in three very important respects:

(a) The indictment was not read nor was the substance of the charge stated to the defendant. Defendant was merely handed a copy of the indictment, at the moment of pleading, with no opportunity to read it.

(b) No copy of the indictment was given defendant before he was called upon to plead. The transcript is clear that the district attorney handed to the defendant a copy of the indictment, and a receipt was required, at the very moment he was called upon to plead—not before.

(c) The court before accepting the plea of guilty, did not first determine "that the plea is made * * * with understanding of the nature of the charge." Under the specific terms of Rule 11 the court "shall not accept the plea without first determining" this vital feature. Nothing whatever was done by the court, nor by anyone in this respect. To be sure the court ascertained that no threats or promises had been made to induce the plea. The court also ascertained that the defendant had talked with his counsel "about the case," which undoubtedly defendant had done, but before an indictment had been filed, and very obviously without reference to any charge made therein or about a plea thereto. And the defendant also answered affirmatively "You are pleading guilty because

you know you are guilty" but it is clear that he believed he was guilty if the tires purchased were stolen, regardless of the element of scienter.

The defendant made it very clear in his testimony of May 20th, that he thought he was guilty because he bought stolen tires, and that is the entire substance of the meaning of the plea of guilty to him.

He was entirely ignorant of the fact that unless he had guilty knowledge that the tires were stolen, at the time they were purchased, he was not guilty of the charge in the indictment.

Nothing in the arraignment tended to enlighten the defendant on this point. He had never at any time been so informed by anyone.

The very thing occurred on this arraignment that the rules are obviously designed to prevent.

It is not that we assign the mere technical non-compliance with these rules as error. But the vital idea is that the rules are designed to lay down a practice, or better expressed, to state a pre-existing practice with reference to arraignments and pleas, one of the objects and purposes of which has always been to make sure that the defendant understood the nature of the charge brought against him.

From the annotations of the Committee who aided in the formation of the Federal Rules of Criminal Procedure, both of the above named rules state the prevailing practice except the requirement that the defendant be given a copy of the indictment before pleading, which is new. Previously a copy of the indictment could be obtained from the clerk. But the rules do certainly lay down the fundamentals of the prevailing practice, which has stood

for centuries. This court has so established in *Crain v. U. S.*, 162 U. S. 625, 16 Sup. Ct. 952, 40 Law Ed. 1097, wherein the court held that the record must affirmatively show a valid arraignment and plea in order to sustain a conviction. This court said in part:

> "In capital or other infamous crimes *an arraignment has always been regarded as a matter of substance.* 'The arraignment of the prisoner,' Lord Coke said: 'is to take order that he appear, and for the certainty of the person to hold up his hand, and *to plead a sufficient plea* to the indictment or other record.'
>
> According to Sir Mathew Hale, the arraignment consists of three parts, one of which, after the prisoner has been called to the bar, *and informed of the charge against him,* is the 'demanding of him whether he is guilty or not guilty, and if he pleads not guilty, the clerk joins issue with him *cul. prit,* and enters the prisoner's plea, then he demands how he will be tried, the common answer is by God and the country, and thereupon the clerk enters *pro se* and prays to God to send him a good deliverance.' *2 Hale,* P. C. 219; So in Blackstone: 'To arraign is nothing else but to call the person to the bar of the court to answer the matter charged upon him in the indictment * * * After which *(after the indictment is read to the accused)* it is to be demanded of him whether he is guilty of the crime whereof he stands indicted, or not guilty.' *4 Bl. Com.* 322, 323, 341.
>
> * * * * *
>
> "The Supreme Court of Wisconsin, in a case of misdemeanor said: 'The record in this case fails to show any issue which the jury were called upon to try. It is the business and duty of the prosecuting officer of the government to move on the trial of criminal cases and to see that the proper issue be made up. It may be probable that the defendant in this case was perfectly aware of the offense with

> which he was charged. It appears that he consented to go to trial, *but a trial of what did he consent to?* He was arrested and held in custody under the process of the court. *It was his right to be informed, and it was the duty of the government to inform him, of the accusation against him. This is done by arraignment and requiring the defendant to plead.*" (Italics ours.)
>
> *Crain v. United States,* 162 U. S. 625, 16 Sup. Ct. 952; 40 Law Ed. 1097.

The requirements of a valid arraignment in the particular respect with which we are here concerned were laid down also in *Fogus v. United States,* 34 Fed. (2) 97, as follows:

> "In the case of *Nicely v. Butcher,* 81 W. Va. 247, 94 S. E. 147, the Supreme Court of West Virginia said: '*Before receiving a plea of guilty in a criminal case,* the court should see that it is made by a person of competent intelligence, freely and voluntarily, and with a *full understanding of its nature and effect, and of the facts on which it is founded.*'
>
> "*We think this correctly states the rule and at* the conclusion *of the hearing on the petitions, the Judge below held that this rule had been strictly* complied with." (Italics ours.)
>
> *Fogus v. United States,* 34 Fed. (2) 97.

Thus, we see that under rules 10 and 11 is laid down in substance and principle the requisites for a valid arraignment; those requisites have existed from time immemorial, and one of the most substantial requisites is that before being required to plead defendant shall be informed of the charge contained in the indictment, either by reading or stating the substance to him, and now under the new rule that he be given a copy before being required to plead.

And it is of the utmost importance to observe that the duty rests upon the court to see that the defendant understands the nature of the charge.

None of these things were done in the very brief proceedings on the arraignment of this defendant. As a result, the defendant pleaded guilty under a material misapprehension of the charge. He never knew that the element of scienter was a necessary element of the offense, and pleaded guilty believing that if he had simply purchased tires that had been stolen, he was guilty.

Thus we see that the arraignment in itself was defective, so defective we believe as to have been void, and certainly not sufficient to disperse the misapprehension of the defendant.

(2) Nor is the common presumption of regularity to be attributed to the arraignment in this case because the defendant was represented by counsel.

Katz never had the advice of counsel pertaining to the indictment. True, he was represented by an attorney, and it is not intended here to disparage counsel. Doubtless when the defendant is represented by counsel, it is commonly presumed that he had counsel's advice. But no such presumption can stand in the face of evidentiary facts that clearly appear.

Katz shows in his affidavit which he himself prepared, and in the testimony which he gave on May 20, 1946, that he had conferred with Mr. May on only one occasion about this case. This occurred when the trouble first arose and before any indictment was filed, when as Katz says, he told May the whole story. However, the indictment was not filed until afterwards, and Katz never saw it until the moment of pleading. So far as we know, May himself had not seen the indictment, although he must have known

the substance of the contents of course. But one of the most important features is that Katz had not even seen his attorney again after the first interview until the moment before pleading, when he was told without preliminaries, "You will plead guilty." There was no time for remonstrance, and no time for explanation. The Attorney had been absent from town and Katz had gone to the arraignment expecting it to be continued for Mr. May had so told him the day before over the telephone on account of the absence of the other defendant, King.

Obviously Katz, never had the advice of counsel about the charge in the indictment. There is no intimation anywhere in the record that Katz ever knew that these were stolen tires, until so informed after his arrest, or that he knew that scienter was an element of the offense.

Indeed the entire record, so far as it pertains to that point is to the contrary, based upon Katz testimony and his affidavits. The probation report shows that he stated the same thing to that department.

Immediately after the arraignment, in the corridor, Katz remonstrated with his attorney, asking him why he had pleaded guilty, and stating that he was guilty of nothing. He was told to forget it, and that he would probably get a suspended sentence, or probation at the most. Remonstrance again two days later by telephone had the same lack of effect.

Katz did no more—though we know little more that he could do—until on May 6th, 1946, when for the first time he knew by the intimation made by the court on that day that he was confronted with a jail sentence, after which with promptness he did the only thing left to him—he procured another attorney.

An application to withdraw the plea of guilty was thereupon promptly filed, and this application, after testimony had been taken on May 20th, was withdrawn, again on the advice of May, who advised its withdrawal, and stated he had something else to work on. It appears that May was present during the taking of this testimony in court, but came forward with no statement, no information, but chose to keep silent.

It stands out boldly in the argument on the motion to withdraw the plea of guilty in the District Court of July 22, 1946 (R. 40-49), that the court believed that the real question was "whether or not he did not have the advice of an attorney for the reason that both Mr. May and Mr. Porritt were either incompetent or dishonest" (R. 46). To our minds, this was a collateral issue, and not the main issue at all. We think the main issue was whether or not the defendant had pleaded understandingly to the indictment. We think that here rests the fundamental error in the District Court.

In any event, under the facts disclosed by the record, it is perfectly apparent that this plea takes no validity from the fact that defendant was represented by counsel for the reason that he never had the advice of counsel with reference to the indictment, as to the charge therein contained, nor what the plea should be thereto.

(3) Nor was this plea entered with any idea of gambling on the sentence of the court—a mere "trial balloon" as it was designated in the lower court by the district attorney. We may at this point completely discount sworn statements of the defendant in his affidavit, Exhibit 1, and his statements under oath in his testimony of May 20th, and confine ourselves to matters which were in the record prior to May 6, 1946, when the court gave its first intimation that a term of months would be imposed.

The Probation Report (R. 57-63) is dated April 17, 1946, followed by a supplemental report (R. 62-63) dated June 28, 1946. In the original report the defendant's statement is recorded "That he was not aware that the tires were stolen" (R. 61), and also the defendant's statement to the effect "that his brother, who was a partner with him made the negotiations with Giordano, the defendant believed that the transaction was legitimate and accepted his brother's representation * * *."

This is a record of a statement made by the defendant to an officer of the court about three week's prior to any intimation that the court would impose sentence. Prior to that time, taking the defendant's statement, he had only been advised that he would receive a suspended sentence, or probation at the worst. Thus, after discounting all of the defendant's statements under oath, we still have his clear and unequivocal statement made to the Probation officer, which fully sustained the position which he has taken.

It seems to us that it is incontrovertably established by the record that the defendant's plea of guilty was not a "trial balloon."

(4) It is true, that on May 6th, 1946, Mr. May stated to the court, at the time he asked the court to place the defendant on probation, that "* * * I decided that it was a violation in the case and that he was a responsible party, had talked it over with him, and he then plead guilty."

The uncontroverted facts in the record establish clearly that Mr. May did not talk it over with him. He never advised with his client with regard to this indictment prior to plea. The only conference he had ever had with Katz was prior to the filing of the indictment. After the indictment was filed, and prior to plea, was merely the hurried

statement in court, just as the cause was called, in which May stated, "You will plead guilty."

This scarcely rises to the dignity of advice of counsel.

As to Mr. May's statement to the court, we can simply say that it is not sustained by the record, but in fact is flatly controverted by every part of the record pertaining thereto.

(5) It thus appears very clearly in the record (a) that Katz pleaded guilty without comprehending or understanding the indictment in a material aspect; (b) That his understanding of the indictment was not aided in any way by the proceedings on the arraignment itself, and that the rules pertaining thereto and the general practice, was not observed in that respect, and (c) That though he was represented by counsel, that he had had no advice in respect to the charge in the indictment, nor as to what his plea should be, due possibly to the fact that his attorney had been out of town.

We think that under these circumstances, the authorities universally hold a timely application to withdraw and the plea should be allowed.

In *Bergen v. U. S.* 145 Fed. (2d) (C. C. A. 8th Circuit 1944) 181, several defendants were indicted under the Fraser-Lemke Act (Title 11 U. S. C. A. Sec. 203) for having conspired together to corruptly administer that section of the Bankruptcy Act. On arraignment, Bergen, in answer to interrogations by the court, rather more thorough than those in the present case, answered that he knew he had a right to be represented by counsel (he appeared without an attorney), that he was familiar with the charge against him, that he had examined the charge, waived the reading of the indictment, had decided upon his plea and pleaded guilty. He, however, presented a prepared state-

ment to the court at the time, detailing the entire transaction, reminiscent of the affidavit of defendant in the instant case. At a trial, some of the other defendants were acquitted and others convicted. About a week after the plea of guilty, Bergen appeared by counsel and asked leave to withdraw his plea of guilty. It was his claim that he did not understand when he pleaded guilty that if he had not defrauded the government he was innocent. He had on the day he asked to withdraw his plea consulted counsel for the first time, and had been so advised. The trial court denied his application to change his plea. The Circuit Court of Appeals reversed the sentence imposed and remanded the cause, saying in part beginning at page 187:

> "*We think it may be gathered from all of the cases that an accused is entitled to withdraw a plea of guilty if it fairly appears that he was in ignorance of his right and of the consequence of his act, or if it appears that the plea was made under some mistake or misapprehension. The withdrawal should not be denied* where a proper showing for its allowance is made, merely because the defendant on a trial might or probably would be found guilty. *While the burden is on the accused to show cause for the change of his plea, the court's discretion should be exercised liberally, so as to promote the ends of justice and to safeguard the life and liberty of the accused, especially where the defendant is without the advice of counsel* and his motion is seasonably made. And, in any case, the motion should not be denied where it is evident that the ends of justice would best be served by granting it.
>
> "*An intelligent and full understanding by the accused of the charge against him is a first requirement of due process. Ammons v. King,* S. Cir. 133 F. (2) 270, 272; *Smith v. O'Grady,* 312 U. S. 329, 61 S. Ct. 572, 85 L. Ed. 859. On a motion by an accused

without counsel for the withdrawal of a plea of guilty on the ground of want of comprehension of the charge, the rights of the accused and the duties upon the trial court are not unlike their respective rights and duties when the question is whether an accused has completely waived his right to the assistance of counsel. * * *

* * * * *

"So, while the accused in the present case had the right, without the advice of counsel, to enter a plea of guilty to the charge against him, *it rested upon the trial, court, when the application for withdrawal of the plea was seasonably made, to determine whether, in the light of all pertinent evidence, the plea of guilty had been made with intelligence and comprehension.* Circumstances important for consideration are the nature of the charge against the accused, his apparent inlelligence and ability to fully comprehend the charges against him, the gravity of the offense charged, the timeliness of the motion to withdraw the plea, and the fact that the accused before entering his plea did not have the advice of counsel.

* * * * *

"The plea was a waiver of fundamental rights, against which every reasonable presumption is indulged, *Glasser v. United States,* 315 U. S. 60, 71, 62 S. Ct. 457, 86 L. Ed. 680.

* * * * *

"It is not to be supposed that a layman, unless advised by counsel, would understand that he might be guilty of the charge in the indictment on proof that he was a party to the conspiracy and that one of his co-conspirators committed one of the overt acts charged, while he committed none. That he was a person of more than ordinary intelligence was not, if true, conclusive on the question. Compare *Glaser v. United States, supra.* Conceding that the trial court's statement, made after the motion to

withdraw the plea had been denied and in response to the accused's request to have the sentence deferred for another day, to the effect that, in his opinion, the accused was not confused as to the charge against him, was a finding by the court on the issue raised by the motion, we think it is not supported by the evidence in the record.

* * * * *

"Moreover, the question here is not the probable guilt of the accused nor what caused him to change his mind, *but whether, at the time of the entry of his plea, he had the requisite understanding of the charges against him.* If he did not, the fact that third parties, for motives of their own, by explanation or influence were able to show him his error or induce him to change his plea is of no significance.

"The judgment of the district court is reversed, and the cause is remanded for further proceedings in conformity with this opinion." (Italics ours.)

Bergen v. United States, 145 Fed. (2) 181 (187-8).

This court has also expressed itself on this subject in the case of *Kercheval v. United States,* 274 U. S. 220, 47 S. Ct. 582, 71 Law Ed. 1009. The question involved in that case was whether or not a plea of guilty, after withdrawal, might be admitted into evidence on behalf of the Government. In the course of deciding that point, this court remarked as follows:

"Out of just consideration for persons accused of crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences. When one so pleads, he may be held bound. *United States v. Bayaud* (C. C.), 23 Fed. 721. But on timely application, the court will vacate a plea of guilty shown to have been unfairly obtained or given *through ignorance, fear or inadvertence.* Such

an application does not involve any question of guilt or innocence. *Com. v. Craop,* 212 Mass. 209, 98 N. E. 702. The court in exercise of its discretion will permit one accused to substitute a plea of not guilty and have a trial *if for any reason the granting of the privilege seems fair and just. Swang v. State,* 2 Coldw. 212, 88 Am. Dec. 593; *State v. Maresea,* 85 Conn. 509, 83 Atl. 635; *State v. Nicholas,* 46 Mont. 470, 472, 128 Pac. 543; *State v. Stephens,* 71 Mo. 535; *People v. McCrory,* 41 Cal. 458, 461; *State v. Coston,* 113 La. 717, 720, 37 So. 619; *Bishop v. New Crim. Proc.,* Sec. 747."

* * * * *

"Courts frequently permit pleas of guilty to be withdrawn and pleas of not guilty to be substituted." (Italics ours.)

Kercheval et al. v. United States, 274 U. S. 220; 47 S. Ct. 582, 71 Law Ed. 1009.

The decisions of the state appellate court are we believe almost universally in favor of the principles for which we here contend. We shall call the court's attention to some of them.

In *Krolage v. People,* 224 Ill. 456, 79 N. E. 570, the court said:

"The withdrawal of the plea of guilty should not be denied in any case where it is evident that the ends of justice will be subserved by permitting the plea of not guilty in its stead. The least surprise or influence causing him to plead guilty when he had any defense at all should be sufficient cause to permit a change of the plea of guilty to not guilty."

Krolage v. People, 224 Ill. 456, 79 N. E. 570.

In *Deloach v. State,* 77 Miss. 691, 27 So. 618, the court said:

"As the plea of guilty is often made because the defendant supposes that he will thereby receive some favor of the court in the sentence, it is the English practice not to receive such plea unless it is persisted in by the defendant after being informed that such plea will make no alteration in the punishment. *1 Arch. Cr. Pr. & Pl.* (8th Ed.) 334. By analogy we think the defendant should be permitted to withdraw his plea of guilty, when unadvisedly given, where any reasonable ground is offered for going to the jury. This is a matter within the discretion of the court, *but a judicial discretion which should always be exercised in favor of innocence and liberty.* All courts should so administer the law and construe the rules of practice so as to secure a hearing upon the merits if possible. *Gauldin v. Crawford,* 30 Ga. 674. The law favors a trial upon the merits by jury." (Italics ours.)

Deloach v. State, 77 Miss. 691, 27 So. 618.

In Michigan it is clearly established by a long course of judicial decisions, that a defendant may withdraw a plea of guilty any time before sentence. *People v. Sheppard,* 316 Mich. 665, 26 N. W. (2) 57.

It would be practically impossible and probably not advisable, to quote from all of the State cases. Some of them were cited by this court in *Kercheval v. United States (supra).* Beside these, in the following cases a like decision was reached:

People v. Scott, 59 Calif. 341;
People v. Miller, 114 Calif. 10, 45 Pac. 986;
McDaniel v. State; 7 Okla. Cr. 740, 120 Pac. 299;
State v. Cimini, 53 Wash. 268, 101 Pac. 891;
State v. Coston, 113 La. 717, 37 So. 619;
State v. Williams, 45 La. Ann. 1357, 13 S. 32;
Mount v. Comm., 89 Ky. 274, 12 S. W. 311;

State v. Stephens, 71 Mo. 535;
State v. Kring, 71 Mo. 551;
Griffin v. State, 12 Ga. A. 615, 77 S. E. 1080;
People v. Walker, 250 Ill. 427, 95 N. E. 475;
Myers v. State, 115 Ind. 554, 18 N. E. 42.

We believe that the foregoing authorities sufficiently establish that there is here involved a very substantial question. We think they conclusively establish that when as in the case at bar, defendant pleaded without an understanding of the charge in the indictment and subsequently within the time set by the court itself, and before sentence, applied to have the plea of guilty set aside and have a trial, that the application should have been granted.

B. THE LOWER COURT EXCEEDED ITS DISCRETION IN UPHOLDING A WAIVER OF DEFENDANT'S FUNDAMENTAL RIGHT TO TRIAL.

(1) We believe that in the instant case, the trial court exceeded its discretion.

The term "discretion" is undoubtedly one of varied meanings. A court may have a very wide discretion in a given case and in another a very narrow discretion. The degree of discretion undoubtedly greatly varies according to the nature of the issue presented.

To assert, as we do, that the court "exceeded its discretion" does not necessarily imply bad motive or wrong purposes, nor perversity, nor passion, prejudice, or partiality. We think that discretion is exceeded when the decision is clearly against the logic and effect of such facts as are presented in support of the application or against the reasonable and probable deductions drawn from the facts disclosed.

We think this is particularly true when discretion is exercised against the waiver of fundamental rights, such as the right to a trial.

It was said in *Murray v. Buell,* 74 Wisc. 14, 19; 41 N. E. 1010:

> "The term 'abuse of discretion' exercised in any case by the trial court, as used in the decisions of the court and in the books, implying in common parlance a bad motive or wrong purpose, is not the most appropriate."
>
> *Murray v. Buell,* 74 Wisc. 14, 41 N. E. 1010.

In *North v. Clinkscales,* 47 S. C. 488, 499; 25 S. E. 797, it wsas said:

> "Abuse of discretion is a phrase unhappily framed, because implying a bad motive or a wrong purpose."
>
> *North v. Clinkscales,* 47 S .C. 488; 25 S. E. 797.

In *Root v. Bingham,* 26 S. D. 118, 119, 128 N. W. 132, the Court said:

> "An accurate exhaustive definition of the phrase 'abuse of discretion,' would be difficult, if not impossible. Each case must be determined with reference to its own peculiar facts. There are different kinds of discretion that may be exercised by the trial court. There is the discretion in the sense of exclusive right to decide as the court pleases, which will not be reviewed by the Appellate Tribunal. There is a discretion in the decision of what is just and proper under the circumstances. The latter kind, the kind of discretion involved will not be revised unless there is an abuse of it; that is, unless it appears that it was exercised on grounds or for reasons, clearly untenable, or to an excess clearly unreasonable. That would be an abuse. *Murray v.*

Buell, 74 Wisc. 14, 41 N. W. 1010. Abuse of discretion granting a new trial does not necessarily imply intentional wrong. In such a case *discretion is abused whenever in its exercise the court exceeds the bounds of reason,* all circumstances of course being considered." (Italics ours.)

Root v. Bingham, 26 S. D. 118, 119; 128 N. W. 132.

(2) Narrowing the discussion of the term "discretion" down to that kind of discretion with which a court is invested in deciding an application to withdraw a plea of guilty, we are furnished with fair guides in the decisions already quoted: "This is a matter within the discretion of the court," said the Supreme Court of the State of Mississippi, in *Deloach v. State,* 77 Miss. 691, 27 So. 618, "but a judicial discretion which should always be exercised in favor of innocence and liberty. All courts should so administer the law and construed the rules of practice as to secure a hearing on the merits if possible—the law favors a trial upon the merits by jury" and "we think it may be gathered from all the cases," said the court in *Bergen v. U. S.,* 145 Fed. (2) 181, "that an accused is entitled to withdraw a plea of guilty if it fairly appears that he was in ignorance of his rights and of the consequences of his act, or if it appears that the plea was made under some mistake or misapprehension, * * * While the burden is on the accused to show cause for the change in his plea, the court's discretion should be exercised liberally so as to promote the ends of justice and to safeguard the life and liberty of the accused, especially where the defendant is without the advice of counsel and his motion is seasonably made. And, in any case, the motion should not be denied where it is evident that the ends of justice would best be served by granting it." And this court said in *Glasser v. U. S.,* 315 U. S. 60, 62 Sup. Ct. 457, 86 Law Ed. 680, "We indulge in

every reasonable presumption against the waiver of fundamental rights."

These cases amply establish that, while the question is one within the discretion of the trial court, such discretion is by no means unlimited—indeed the field of discretion is narrow.

The following facts were before the trial court, wholly without contradiction, when a timely application to change the plea of guilty to not guilty was made before sentence:

(a) At the time of pleading the defendant did not understand the nature of the charge in the indictment, i. e., he did not understand that the charge involved guilty knowledge, but believed that if the tires were stolen and had been purchased it constituted guilt. This clearly appears in defendant's exhibit 1, the affidavit prepared by the defendant himself, his affidavit attached to his application to change his plea, and his testimony of May 20, and his statement to the Probation Department.

(b) Defendant had no advice of counsel relative to the indictment or plea, doubtless due primarily to the absence of his attorney from the city up to the day prior to arraignment.

(c) Defendant acted promptly to procure withdrawal of his plea, remonstrating with his attorney the day it was made, and again 2 days later by telephone, and as soon as it was intimated by the court that catastrophe impended in the way of a jail sentence, promptly changed attorneys and procured the prompt filing of an application to change his plea.

(d) The facts disclosed a defense in that defendant, just returned from military service, had not at the time of the transaction begun to devote himself to the business fully, did not participate in the transaction of the pur-

chase of the tires at all beyond overhearing some of the talk of the transaction, and giving his brother some money when asked, not knowing anything other than it was to apply on the purchase of tires, and never knowing that the tires were stolen, or that anything was wrong with them whatsoever until after his arrest.

With these uncontradicted facts before it, we think the trial court's refusal to allow withdrawal of the plea of guilty exceeded its discretion. It was a clearly erroneous conclusion and judgment—one clearly against the logic and effect of the facts presented, and against the reasonable and probable deductions from the facts disclosed.

C. REASONS RELIED UPON FOR ISSUANCE OF THE WRIT.

We are confident, to begin with, that this is a meritorious claim for review. We feel certain that the record is convincing that permission should have been granted to withdraw the plea of guilty.

We are aware that something beyond this is required in this court to procure the issuance of the writ sought, and those things we also believe this record presents.

We call the court's attention to the following:

(a) The lower court decided a Federal question in a way probably in conflict with the applicable decisions of this court.

This court has, in at least two decisions quoted above *(Kercheval v. U. S.,* and *Crain v. U. S.)* laid down the basic principles of a valid arraignment of a defendant charged with a felony, Certainly one of these requirements is and ought to be that the court determine on arraignment that defendant understand the charges in the indictment before

being required to plead. "An intelligent and full understanding by the accused of the charge against him, is the first requirement of due process." *Smith v. O'Grady*, 312 U. S. 329, 61 S. Ct. 572, 85 Law Ed. 859.

We think that the decision of the Circuit Court of Appeals of the 6th Circuit in this case is probably in conflict with the decisions of this court.

(2) The Circuit Court of Appeals has so far sanctioned the departure by the trial court from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of revision.

The principles governing a proper arraignment of the defendant accused of a felony are fundamental. They surely are at the root of "the accepted and usual course of judicial proceeding" as is evidenced not only by the decisions of many courts, but by rules 10 and 11 of the Federal Rules of Criminal Procedure.

The Circuit Court of Appeals has in this case "sanctioned the departure" by the District Court from this accepted course of judicial proceeding. It did not require that the indictment be either read or explained, that a copy be furnished before pleading, and above all, that the court ascertain that the defendant understood the charge before being required to plead.

We feel that a departure from these principles is so fundamental as to call for an exercise of this court's power of revision.

(3) The right to a trial of any person charged with an offense is involved.

The petitioner here discloses a defense to the charge brought against him. He asks for a trial. He has not competently waived his right to a trial. "This court indulges

in every reasonable presumption against waiver of fundamental rights." *Glasser v. U. S.*, 316 U. S. 60, 62 S. Ct. 457, 86 Law Ed. 680.

(4) The lower court, being the Circuit Court of Appeals, for the 6th Judicial Circuit, has rendered a decision which in the opinion of counsel is in conflict with the decisions of another Circuit Court of Appeals.

The holding of the 8th Circuit in *Bergen v. U. S.*, 145 F. (2) 181, is clearly that "an accused is entitled to withdraw a plea of guilty if it fairly appears that he was ignorant of his right and of the consequence of his act, or if it appears that the plea was made under some mistake or some misapprehension."

It seems to us that the decision of the Circuit Court of Appeals of the 6th Circuit, in this case is in direct conflict with that of the 8th Circuit in the Bergen case.

(5) The case presents the question, which would seem to be of general interest, as to whether or not on the arraignment on an indictment there must not be at least a substantial compliance with the Federal Rules of Criminal Procedure formulated by this court, particularly rules 10 and 11.

Nothing is more common in any trial court than proceedings for arraignment of those charged with felony. The principles governing ought to be well understood. They are of long standing and fundamental. The necessity of adherence to these principles transcends the rights of this petitioner. It applies to the arraignment every day of defendants everywhere.

An opinion of this court would be of general benefit, not merely of benefit to this petitioner. Particularly do we feel that it is of importance that announcement by this court in its considered opinion, will be of importance on the ques-

tion of the duty of a trial court on the arraignment of a defendant charged with a felony, to determine that he understands the nature of the charge before being required to plead, and also as to what showing is necessary to secure the right to withdraw a plea of guilty made under misapprehension.

We submit the above as moving reasons why the Writ prayed should be issued.

V.

RELIEF SOUGHT

We ask that a Writ of Certiorari issue out of this court, directed to the Circuit Court of Appeals for the 6th Judicial Circuit requiring a review of its decision on April 7th, 1947, affirming the decision of the District Court.

EDWARD N. BARNARD,
Attorney for Petitioner.

INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 447

HYMAN KATZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The per curiam opinion of the circuit court of appeals (R. 79) is reported at 161 F. 2d 869.

JURISDICTION

The judgment of the circuit court of appeals was entered April 7, 1947 (R. 79), and a petition for rehearing was denied October 21, 1947 (R. 100). The petition for a writ of certiorari was filed November 20, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judical Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Whether the circuit court of appeals had jurisdiction to consider the appeal.

2. Whether the trial court abused its discretion in refusing to permit petitioner to withdraw his plea of guilty.

RULES INVOLVED

Rule 10 of the Federal Rules of Criminal Procedure provides as follows:

> Rule 10. Arraignment. Arraignment shall be conducted in open court and shall consist of reading the indictment or information to the defendant or stating to him the substance of the charge and calling on him to plead thereto. He shall be given a copy of the indictment or information before he is called upon to plead.

Rule 11 of the Federal Rules of Criminal Procedure provides in pertinent part as follows:

> Rule 11. Pleas. A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge. * * *

Rule 32 of the Federal Rules of Criminal Procedure provides in pertinent part as follows:

> Rule 32. Sentence and Judgment.
>
> * * * * *

> (d) Withdrawal of Plea of Guilty. A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

STATEMENT

On March 1, 1946, an indictment was filed in the District Court for the Eastern District of Michigan charging petitioner and his brother, Norman Albert King, with a violation of 18 U. S. C. 409 by receiving 66 Firestone tires, which they knew had been stolen from an interstate shipment (R. 4, 6). On April 3, 1946, petitioner, who was represented by an attorney, was arraigned and pleaded guilty. Sentence was deferred and the case referred to the probation officer. The indictment was dismissed as to King. (R. 4, 8, 9–10). On July 17, 1946, petitioner filed a motion to vacate his plea of guilty on the ground that he had not understood the nature of the accusation at the time of arraignment (R. 5, 35–39). On July 22, 1946, after a full hearing in the district court, the motion was denied, and petitioner was then sentenced to imprisonment for 10 months (R. 5, 49, 63, 64). On July 23, 1946, petitioner noted an appeal "from the order of the District Court denying his motion to vacate and set aside

a plea of guilty" (R. 5, 65). The order was affirmed on appeal (R. 79), and the present petition seeks a review of that decision.

The evidence upon which the district court determined that petitioner had entered his plea of guilty with full knowledge of the nature of the accusation may be summarized as follows:

Petitioner, who has been an automobile salesman since 1928, and is manager and part owner of a used car lot (R. 17, 18–19, 60–61), was interviewed by an F. B. I. agent late in October 1946, with respect to some tires in his possession which were discovered to have been stolen from an interstate shipment (R. 20–22). Petitioner went immediately to an attorney, May, to tell him the story and ask advice, and when petitioner and his brother were arrested several days later they retained May as counsel (R. 22, 53).

Upon arraignment five months later petitioner, appearing with May as counsel, waived the reading of the indictment and pleaded guilty (R. 4, 8). He also signed an acknowledgment to the effect that he had received a copy of the indictment prior to pleading and had read and understood it (R. 7). The transcript of the proceedings is as follows (R. 9–10):

> Appearances: Mr. Thomas P. Thornton, Assistant U. S. District Attorney, in behalf of the Government; Mr. Alfred May, in behalf of the defendant.

Mr. THORNTON. I have a plea in the Katz case. Let the record show that I am handing the defendant a copy of the indictment.

The COURT. All right. Give him the receipt.

Mr. MAY. In this case, if the court please, this defendant, Katz, desires to enter a plea of guilty at this time.

The COURT. Have him sign that receipt for the indictment, Mr. Katz, did you hear what Mr. May said?

The DEFENDANT. Yes, sir.

The COURT. Did anybody make any promise to you to get you to plead guilty?

The DEFENDANT. No, sir.

The COURT. Anybody make any threats to cause you to plead guilty?

The DEFENDANT. No, sir.

The COURT. You have talked with Mr. May about this case, have you?

The DEFENDANT. Yes, sir.

The COURT. You are pleading guilty because you know you are guilty, is that correct?

The DEFENDANT. Yes, sir.

The COURT. All right. The plea will be accepted and the matter referred to the Probation Department, for investigation and report. I can't give you the sentence date at this time, Mr. May, because there is another defendant in the same case here. What about the bond, Mr. May? Thornton?

Mr. THORNTON. $2500. We recommend the bond be continued.

The COURT. All right. The bond may be continued. Mr. May, will you take him to the Probation Department to make another appointment.

Mr. THORNTON. There is another defendant in this case, Albert King. As to Albert King, the government moves to dismiss the indictment.

The COURT. All right. The motion to dismiss as to King may be granted. Well, then, Mr. May, I can give you a sentence date. Any Monday all right with you?

Mr. MAY. I think, your Honor, for your own information, the Probation Department may want to talk to the other defendant who was dismissed in the case, and he is in Cleveland, so maybe we better wait for them to conclude their investigation and they will notify us.

The COURT. All right.

On May 6, 1946, petitioner appeared in court for sentence. His attorney stated that "after going over all the facts in the case with him, I decided that it was a violation in the case and that he was the responsible party, and talked it over with him and he then plead guilty."[1] The attorney's request for probation was denied, the court indicated that the sentence would be ten

[1] There is some evidence that petitioner assumed full responsibility in order to have the indictment dismissed as to his brother, who has heart trouble (R. 25, 52, 53, 54).

months, and a date was set for formal imposition of sentence. (R. 4, 11.)

One week later, on May 13, 1946, petitioner appeared with a new attorney, Porritt, and asked leave to file a motion to vacate the plea of guilty, alleging that he was innocent and did not understand the charge at the time of arraignment (R. 4, 12–15). After a hearing at which petitioner testified at great length (R. 16–33), the proceedings were adjourned in order to give petitioner an opportunity to have May testify that he had not fully explained the charge prior to arraignment (R. 4, 55). Immediately after the hearing there was a conference between petitioner, May and Porritt, at which May advised that it would be best to withdraw the motion "because he had reasons to believe the Judge would deny it" (R. 56). Two days later Porritt, with petitioner's consent, withdrew the motion (R. 5, 42, 56).

After imposition of sentence had been deferred several times during the next two months, a new attorney, Louisell, filed a second motion to vacate the plea based upon the same grounds, and alleging further that petitioner had not read the indictment prior to pleading, nor had he consulted with counsel as to the indictment or consented to plead guilty (R. 5, 35–39). At the hearing no new evidence was admitted. Attorney Louisell stated that the only new proof he would like to have in the record was an affidavit, dated June 14, 1946,

prepared by petitioner himself. But when the court noted that the affidavit questioned the competency and honesty of the advice given by May and Porritt, and stated that if proof was to be received on that issue May and Porritt should be present, the affidavit was never received in evidence, although it now appears in the record.[2] (R. 40–49, 70–75.) The motion was denied and sentence was formally imposed (R. 5, 49).

Throughout the proceedings petitioner's story of the acquisition of the tires has varied considerably. He told the F. B. I. agent who originally interviewed him that he had purchased four tires from a peddler (R. 21). When the case was referred to the probation officer after he had pleaded guilty he stated that his brother had bought the tires from Giordano (R. 58). Some time later he told an assistant district attorney that he had stored seventeen of the tires in a shed and that he did not know what became of thirteen of them (R. 24–25). At the hearing on the first motion he testified that he heard his brother buy the tires from Giordano, that he gave his brother several hundred dollars in cash as part of the payment, and that he had given the seventeen tires for safekeeping to an acquaintance (R. 17, 19, 27, 32). In the affidavit of June 14, 1946, he ad-

[2] It will be noted that petitioner places great reliance on this affidavit throughout the brief in support of the petition for certiorari (Pet. 2, 3, 6–8, 19–20, 22–23, 32–33).

mitted that his brother had bought sixty tires, and claimed that the acquaintance who took charge of the seventeen had sold thirteen without permission (R. 51, 55).

Petitioner's explanation of his plea, as stated in his affidavit of June 14, 1946, is that he did not know the tires were stolen until so informed by the officers, and that he did not understand that he was charged with guilty knowledge; that he did not see May from the time of their first meeting in November until the morning of the arraignment in April, and that they had never discussed a plea to the indictment; that he had not read the indictment and did not consent to the plea; and that, although May told him afterward that he would get probation or a suspended sentence at worst, he requested that the plea be changed (R. 50–56).

ARGUMENT

1. Petitioner has not appealed from the judgment sentencing him to imprisonment. He specifically appealed only from the order of July 22, 1946, denying his motion to vacate the plea of guilty (*supra*, pp. 3–4). This order did not "subject the defendant to any form of judicial control," and does not meet the test prescribed by this Court for determination of the finality of orders in criminal cases. *Korematsu* v. *United States*, 319 U. S. 432, 434. Such orders have

been specifically held to be interlocutory and non-appealable. *Farrington* v. *King,* 128 F. 2d 785, 787 (C. C. A. 8); *People* v. *Dabner,* 153 Cal. 398, 95 P. 880; *People* v. *Shaffer,* 130 Cal. App. 749, 20 P. 2d 345; *People* v. *Price,* 51 Cal. App. 2d 716, 125 P. 2d 529; *State* v. *McDowall,* 197 Wash. 323, 85 P. 2d 660; see also *United States* v. *Knight,* 162 F. 2d 809 (C. C. A. 3). It would appear, therefore, that the circuit court of appeals had no jurisdiction to consider the appeal.

2. But even if a proper appeal had been noted from the final judgment sentencing petitioner to imprisonment, we think the petition for certiorari presents no question which merits review by this Court. The nub of petitioner's argument is that he did not understand the nature of the accusation at the time af arraignment, and consequently that the trial court abused its discretion in not permitting him to withdraw his plea of guilty[3] (Pet. 14–15; Br. 12–13).

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[3] Petitioner concedes by implication that permission to withdraw the plea is discretionary with the trial court (Br. 13, 25, 27, 29–33). This has been consistently the position of the federal courts. *Kercheval* v. *United States,* 274 U. S. 220, 224; *United States* v. *Mignogna,* 157 F. 2d 839 (C. C. A. 2), certiorari denied, 330 U. S. 830; *Rosensweig* v. *United States,* 144 F. 2d 30 (C. C. A. 9), certiorari denied, 323 U. S. 764; *United States* v. *Fox,* 130 F. 2d 56 (C. C. A. 3), certiorari denied *Fox* v. *United States,* 317 U. S. 666; *United States* v. *Denniston,* 89 F. 2d 696, 698 (C. C. A. 2), certiorari denied, 301 U. S. 709; *Rachel* v. *United States,* 61 F. 2d 360 (C. C. A. 8); *Fogus* v. *United*

The burden rested upon petitioner to show cause why he should be permitted to change his plea, *Bergen* v. *United States,* 145 F. 2d 181, 187 (C. C. A. 8), and we think there can be no doubt that the evidence amply justified the court's refusal. That evidence shows that petitioner had had long experience in the automobile business; that he consulted an attorney as soon as he realized that he was in trouble, and that he was advised to plead guilty; that he appeared with counsel at the arraignment,[4] five months later, and stated that he pleaded guilty because he knew he was guilty; that he had read and understood the indictment; and that he did not insist on withdrawing his plea until he realized that he was not going to be put on probation. Perhaps the strongest point against petitioner is the fact that he never availed himself of the opportunity to have May, who he claimed had not made him fully aware of the nature of the accusation, present his version to the court. At the adjournment of the hearing on the first motion to vacate the plea, the judge advised petitioner to have

States, 34 F. 2d 97 (C. C. A. 4); *Gleckman* v. *United States*, 16 F. 2d 670, 673 (C. C. A. 8); *Camarota* v. *United States*, 2 F. 2d 650, 651 (C. C. A. 3). The notes appended by the Advisory Comimttee to Rule 32, Federal Rules of Criminal Procedure, show that there was no intent to modify this existing practice.

[4] In this the case is clearly distinguishable from *Von Moltke* v. *Gillies*, No. 73, this Term, now pending before the Court.

May appear in court two days later; but after a conference between May, Porritt and petitioner, at which May said that he had reason to believe the motion would be denied, it was withdrawn (*supra,* p. 7). Again, at the hearing on the second motion no move was made to obtain the testimony of May and Porritt, despite repeated suggestions by the court (*supra,* p. 8). We think the conclusion is obvious that May's story would have been unfavorable to petitioner. In view of this evidence and in view of petitioner's unreliability as a witness (*supra,* pp. 8–9), there was nothing to require the court to allow the plea to be withdrawn.

Petitioner contends that the arraignment was defective in that there was neither a reading of the indictment nor a statement of its substance, as prescribed by Rule 10 of the Federal Rules of Criminal Procedure, and in that the court did not first determine, prior to accepting his plea, whether he understood the charge, as prescribed by Rule 11 (Pet. 15; Br. 12, 14–19, 34, 35). The simple answer to the first point is that a reading of the indictment was waived.[8] We also think

[8] This appears specifically on the docket and in the court's order (**R.** 4, 8). It also appears by implication from the transcript, for petitioner's attorney announced the plea of guilty after petitioner had been handed a copy of the indictment, without waiting for the court to read it or state its substance (*supra*, p. 5).

As to waiver of arraignment, see *Garland* v. *Washington*, 232 U. S. 642; *Rulovitch* v. *United States*, 286 Fed. 315 (C. C. A. 3), certiorari denied, 261 U. S. 622; *State* v. *O'Toole*,

that the court fulfilled the requirements of Rule 11. In the court's presence petitioner was handed a copy of the indictment. Whether he then and there read it does not appear, but he did, in the court's presence and before his plea was accepted, sign an acknowledgment that he had read it and understood its contents. The court then ascertained whether the plea was voluntary by asking petitioner whether any threats or promises had been made to him. Finally, the court asked whether petitioner had talked the case over with May and whether his plea was the result of knowledge that he was guilty. Only then did the court accept the plea. The indictment clearly charged that petitioner had received the tires "knowing all the aforesaid tires to have been stolen" (R. 6); May's professional reputation for competence and honesty is excellent (R. 41–42); and petitioner is an experienced business man of normal mentality (R. 60–61). Under the circumstances, we think it was unnecessary for the court to take any further steps to determine that petitioner understood the nature of the charge.[6]

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115 N. J. L. 205, 178 A. 780, certiorari denied, 296 U. S. 613. The new rules of criminal procedure were not intended to make any change in this state of the law. See the notes of the Advisory Committee to Rule 10, and see the proceedings of the New York University School of Law Institute, pp. 162, 187, 214.

[6] Petitioner relies strongly (Pet 15; Br. 23–26, 35) upon *Bergen* v. *United States*, 145 F. 2d 181 (C. C. A. 8). We submit that that case is readily distinguishable in that the

CONCLUSION

The decision of the circuit court of appeals is correct, and no conflict of decisions is involved. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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DECEMBER 1947.

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defendant was without counsel at the time of arraignment, and he also filed with the court, simultaneously with his plea of guilty, a lengthy statement the effect of which was to deny his guilt. It is true that the present petitioner, within two weeks *after* arraignment, stated to the probation officer that he did not know the tires were stolen (R. 58). But the effect of this statement is outweighed by the fact that when he returned to court for sentence on May 6, 1946, he again, without protest, heard May state that he was the responsible party, and that they had talked it over and decided upon a plea of guilty (R. 11).

Petitioner also insists that he never had advice of counsel as to his plea, because the record shows that May never discussed the indictment with him (Br. 12, 13, 19–21, 22–23). However, even if there was no discussion of the case after the formal finding of the indictment, which we are not forced b ythe record to concede, it is clear that May and petitioner discussed the facts which led to the indictment.

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